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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

In re METROPOLITAN SECURITIES
LITIGATION

NO. CV-04-025 FVS

CLASS ACTION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION *IN LIMINE* TO
PRECLUDE EVIDENCE OF
REGULATORY ENFORCEMENT
INVESTIGATIONS AND ACTIONS
UNRELATED TO ACCOUNTING
MATTERS

Hearing Date: March 3, 2010
9:00 a.m.

WITH ORAL ARGUMENT

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PRECLUDE EVIDENCE REGULATORY
ENFORCEMENT - 1 of 15
(CV-04-025-FVS)

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I. PRELIMINARY STATEMENT

This is a Section 11 case involving claims relating to Metropolitan Group registration statements. As a result of recent settlements, the remaining claims involve PwC and Metropolitan and Summit FY 2000 financial statements and five Individual Defendants who signed those registration statements.

Nonetheless, PwC has made clear its intent that this trial be about everything but the registration statements. PwC hopes to make this trial about the alphabet soup of regulatory agencies that investigated matters wholly apart from the registration statements including the U.S. Department of Justice, the U.S. Postal Service, the SEC, NASD (now FINRA) and the Washington Department of Financial Institutions ("DFI").

PwC seeks to introduce documents and evidence concerning these matters to divert the jury's attention and to inflame and confuse the jury in the hope it will place blame on other persons who had little if any involvement with the registration statements. For the following reasons, the Court should preclude such argument and declare each of these items is inadmissible under Federal Rules of Evidence.

II. ARGUMENT

A. Evidence of Regulatory Investigations and Enforcement Proceedings Are Inadmissible.

As the Court is well aware, the NASD conducted an investigation in late 2002 and into 2003 concerning Metropolitan Investment Securities, Inc. ("MIS"), the subsidiary of Summit that was the exclusive broker for the sales of all Metropolitan Group securities. Plaintiffs have not objected to the introduction of evidence of the fact of the investigation and its result, namely the entry by MIS into an Acceptance, Waiver and Consent (AWC) agreement with the NASD in October 2003. From this evidence, PwC can make its arguments relative to its "negative causation" defense.

PwC has made clear that this is not sufficient to achieve its goal of distracting the jury. Instead, PwC hopes to run far afield with a plethora of evidence relating to a host of investigations and regulatory actions, most of which occurred long after the bankruptcies of Metropolitan and Summit and none of which concerned the registration statements, the financial statements or accounting issues. In general, these matters concern investigations into the sales and marketing practices of individual brokers, some of whom were subsequently sanctioned.

There are a variety of reasons for excluding this evidence. First and foremost, it is not relevant. Because this is a Section 11 case, reliance on the registration statements is presumed. Thus, "transaction causation" is

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1 not at issue. What a broker said or didn't say is simply not relevant to
 2 whether there were false and misleading statements in the registration
 3 statement. *See*, Plaintiffs' Memorandum in Support of Motion to Exclude
 4 Evidence Related to Investor Reliance on Broker Misrepresentations.

5
 6 Second, introduction of such evidence would be confusing to the jury
 7 and have the tendency to mislead them into believing that broker
 8 representations or actions were relevant to Section 11 liability. Thus, the
 9 evidence should be precluded under FRE 403 as more prejudicial than
 10 probative.

11 Third, introduction of such evidence would be highly prejudicial to the
 12 Class. Focusing on the alleged "bad acts" of actors who have no
 13 responsibility for the registration statements with regard to conduct that is
 14 not relevant to Section 11 claims or damages creates the very real
 15 possibility of prejudice and decision making on factors that are improper and
 16 outside the law.

17 Therefore, Plaintiffs respectfully request that the Court preclude
 18 evidence and testimony related to:

- 19 • The investigation of William Edward Sears and Patricia Sears-
 20 Million by the Postal Service and the resulting criminal
 21 complaint and plea agreement in *United States of America v.*
 22 *William Edward Sears and Patricia Sears-Million*, Dist. Ct. Or,
 23 Cause No. 05-377 (HA);
 24

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- 1 • The investigation by the SEC and resulting SEC enforcement
2 action, *In the Matter of Metropolitan Mortgage & Securities*
3 *Co., Inc., Summit Securities, Inc., and Western United Holding*
4 *Co.*, US Securities and Exchange Commission File No. SF-
5 02682-A;
- 6 • The investigation and subsequent enforcement action in
7 Securities and Exchange Commission v. C. Paul Sandifur, Jr.,
8 Thomas Turner, Robert Ness, Thomas Masters, Dan W.
9 Sandy, David Syre and Trillium Corporation, Dist. Ct. E.D. WA,
10 Cause No. CV5-1631 (JCC);
- 11 • The NASD investigation and resulting enforcement action
12 titled *Department of Enforcement v. Ronald Pelligrino*, NASD
13 Office of Hearing Officers Disciplinary Proceeding No.
14 C3B050012;
- 15 • The Washington DFI investigations and related enforcement
16 actions against Ross Bruner, Ryan Saccomanno, Ronald
17 Saccomanno and Steve Hoag, OAH Case No: 2005-DFI 1.

18 Some of these matters resulted in plea agreements or settlements.
19 Others resulted in sanctions. Regardless of the outcome, they have no
20 relevance in the present action. *Beck v. Cantor, Fitzgerald & Co., Inc.*, 621
21 F.Supp. 1547, 1565 (N.D.Ill.1985) (exclusion of all evidence of SEC
22 investigation, SEC opinion and plaintiff's acquiescence in the SEC opinion as
23

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1 “irrelevant and immaterial for several reasons”, including Court’s view that
2 plaintiff’s acquiescence in SEC opinion was inadmissible pursuant to Rules
3 408 and 410); *In re Cenco Inc. Sec. Lit.*, 601 F.Supp. 336, 337 n. 3
4 (N.D.Ill.1984) (references to SEC Accounting and Auditing Enforcement
5 Release inadmissible as evidence of settlement pursuant to Rule 408).
6

7 **B. Regulatory Orders are Inadmissible.**

8 Regulatory enforcement orders have repeatedly been excluded from
9 evidence based on Rule 408. *See, e.g., Petruzzi’s IGA Supermarkets, Inc. v.*
10 *Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1247 (3d Cir.1993) (evidence of
11 settlements in two antitrust actions inadmissible under Fed.R.Evid. 408); *In*
12 *re Japanese Elec. Prods. Antitrust Lit.*, 723 F.2d 238, 275 (3d Cir.1983),
13 *rev’d on other grounds sub nom Matsushita Elec. Indus. Co. v. Zenith Radio*
14 *Corp.*, 471 U.S. 1002, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985) (consent
15 order in regulatory matter not admissible in a related civil judicial
16 proceeding). *See also Kramas v. Security Gas & Oil, Inc.*, 672 F.2d 766, 772
17 (9th Cir.1982) (exclusion of evidence of SEC Consent Decision affirmed,
18 albeit pursuant to Rule 404(b) and Rule 403).
19

20 Accordingly, any evidence of regulatory enforcement actions, including
21 those with the former Metropolitan or Summit officers, directors, and MIS
22 personnel or brokers must be excluded.
23
24

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C. Settlements Are Inadmissible Pursuant to Federal Rule of Evidence 408.

As to any proceeding that resulted in a settlement, FRE 408 provides another independent basis for exclusion. Such evidence and argument is inadmissible under FRE 408(a). Conceivably, the evidence may be admissible for some other purpose, but not to prove fault or place the blame on another party. Plaintiffs cannot be certain which settlements PwC may seek to offer evidence about, but this motion extends to testimony, exhibits, or argument about any such settlements, including those matters listed above as well as:

- The April 2006 Interpleader Settlement agreement among the Debtors (Metropolitan and Summit), the Securities Class Plaintiffs, dozens of brokers and hundreds of their former clients and certain former officers and directors of Metropolitan and Summit which contains explicit disclaimers of any liability by the settling parties and expressly invokes the protections of FRE 408;
- The March 2008 settlement between PwC and the Metropolitan and Summit Creditors' Trusts;
- The settlement between Metropolitan and the IRS regarding the FLIP Transaction; and

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- Settlements between the NASD (FINRA) or Securities and Exchange Commission (SEC) and some of Metropolitan and Summit's former directors, officers, and employees or brokers.

Any and all evidence of such settlements should be excluded under FRE 408(a) if offered for the purpose of proving (or disproving) fault or other culpability by any of the parties to such settlements. That Rule provides as follows:

Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim ...:

- (1) furnishing or offering or promising to furnish - or accepting or offering or promising to accept - a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or statements made in compromise negotiations regarding the claim

By its terms, FRE 408(a) prohibits a party from using evidence of a settlement agreement to prove either liability or the absence of liability. That prohibition extends to settlements involving third parties, such as the settlements at issue here, that a party offers at trial in an effort to eliminate or reduce its own liability or damages. *See United States v. Contra Costa County Water Dist.*, 678 F.2d 90 (9th Cir. 1982) (affirming district court's

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1 exclusion of settlement agreement that water district offered as evidence
 2 that its damages should be reduced by amount of settlement negotiated
 3 with another party); *Hudspeth v. C.I.R.*, 914 F.2d 1207, 1213 (9th Cir. 1990)
 4 (FRE 408 applies to third party settlements).

5
 6 Based on PwC's responses to Plaintiffs' objections to PwC's deposition
 7 designations and exhibits, Plaintiffs expect PwC to argue that such
 8 settlements are admissible evidence that third parties - rather than PwC -
 9 are at fault or liable for Plaintiffs' injuries. The argument is unavailing. FRE
 10 408(a) prohibits admission of evidence relating to settlements regardless of
 11 whether the evidence is relevant to the issue of fault, causation, or
 12 damages; even when the case involves comparative fault issues. *See*
 13 *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 248 (1st Cir. 1985) (reversing district
 14 court's admission of plaintiffs settlement with a third party where defendant
 15 argued that plaintiff's injury was caused by the third party and not by the
 16 defendant); *Young v. Verson Allsteel Press Co.*, 539 F. Supp. 193 (E.D. Pa.
 17 1982) (excluding evidence of plaintiff's settlement with former co-defendant
 18 based on FRE 408).

19
 20 Some of the settlements that PwC may seek to admit are inadmissible
 21 on additional, independent grounds as well. At this stage, it is difficult to
 22 discern what arguments PwC may make in support of admitting evidence of
 23 settlements. Therefore, Plaintiffs reserve their right to object to any
 24 settlement evidence on additional grounds as well, including the grounds

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1 cited in plaintiffs' objections to PwC's witness list, exhibit list, and deposition
2 designations.

3 **D. SEC Complaints are Inadmissible.**

4 Regulatory complaints by a government agency against a private
5 litigant are also inadmissible "immaterial matter" in subsequent civil
6 proceedings. "Immaterial matter," within meaning of federal rule of civil
7 procedure allowing a court to strike immaterial matter from a pleading, is
8 that which has no essential or important relationship to the claim for relief or
9 the defenses being pleaded. *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*
10 258 F.R.D. 663 (W.D.Wash. 2009).

11
12 In *In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig.*, 218
13 F.R.D. 76, 78 (S.D.N.Y. 2003), the Court held that references to regulatory
14 complaints are immaterial stating that, "references to preliminary steps in
15 litigations and administrative proceedings that did not result in an
16 adjudication on the merits are 'immaterial'" under the Federal Rules of Civil
17 Procedure and ordered the references to such matters stricken from the
18 complaint. Likewise, the regulatory complaints filed against Metropolitan,
19 Summit, their former directors, officers and MIS personnel and brokers are
20 immaterial and irrelevant in this case and should be excluded.

21
22 In addition, the Court should exclude reference to enforcement
23 documents on the basis that they constitute rank hearsay. Since any
24 regulatory complaints are not admissible to prove the truth of their contents,

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1 and they are otherwise irrelevant, the Court should rule *in limine* that they
2 are inadmissible. *See Stevenson v. Hearst Consol. Publ'ns, Inc.*, 214 F.2d
3 902, 907 (2d Cir. 1954) ("Of course, the complaint was inadmissible as
4 hearsay to prove the truth if its contents.")

5
6 **E. The Receiver's Filings Are Inadmissible**

7 PwC has identified numerous filings by the WULA Receiver as exhibits
8 it intends to use in this case. The Receiver Filings contain Receiver Status
9 Reports regarding the financial activities and performance of WULA. Except
10 to the extent that some of them contain factual detail needed to compute
11 damages, these reports are irrelevant and any probative value is outweighed
12 by their danger of unfair prejudice, confusion of the issues and misleading
13 the jury. The Court should accordingly preclude reference to such filings,
14 except to the extent certain portions are needed to compute the damages
15 suffered by the Class.

16 Further, the Receiver Filings should also be excluded because they
17 constitute inadmissible hearsay. *See Liberty Mut. Ins. Co. v. Rotches Pork*
18 *Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (improper for district
19 court to rely upon orders in bankruptcy proceeding to establish facts
20 asserted therein); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.
21 1991) ("courts routinely take judicial notice of documents filed in other
22 courts, again not for the truth of the matters asserted in the other litigation,
23
24

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1 but rather to establish the fact of such litigation and related filings.”)
2 (emphasis added).

3
4 **III. CONCLUSION**

5 Accordingly, Plaintiffs request the Court enter an Order excluding all
6 references to regulatory enforcement proceedings, regulatory complaints,
7 settlements, consent orders, and Receiver Filings.

8 Dated this 16th day of February 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The Court or the CM/ECF system will send notification of such filings to the CM/ECF participants listed below, and I will mail the same via U.S. Postal Service to the non-CM/ECF participant(s).

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